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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: WELDING FUME PRODUCTS LIABILITY LITIGATION	:	**Case No. 1:03-CV-17000**
	:	**(MDL Docket No. 1535)**
	:	
	:	**JUDGE O'MALLEY**
	:	
	:	**ORDER**

On June 8, 2009, the Court met with the parties to discuss the setting of additional bellwether trials and to obtain agreements on related matters. Pursuant to this discussion, the Court now Orders as follows.

- Earlier, the Court set for trial the case of *Ousley v. Lincoln Electric Co.*, case no. 04-CV-17327, to begin on January 25, 2010. Plaintiffs have since notified the Court they wish to withdraw this case from the trial process. Accordingly, *Ousley* is **DISMISSED** with prejudice. The case of *Ray v. Lincoln Electric Co.*, case no. 04-CV-18252, is set for trial on the same date, to replace *Ousley*.

- Plaintiffs stated there are a number of cases (about 29) where: (1) they previously certified they intended to take the case to trial, but (2) after undertaking additional investigation as suggested by the Court, they now wish to withdraw their certification. The Court granted this request, and now **ORDERS** as follows with regard to these "decertified" cases.

As to all decertified cases, plaintiffs' counsel shall file on the individual case docket a motion to withdraw or a motion to dismiss, within 14 days of the date of this Order.

In any case where counsel for plaintiff files a motion to withdraw, the plaintiff shall have 60 days from the date of the filing of the motion to withdraw to obtain replacement counsel. If no replacement counsel files a timely notice of appearance, defendants may file a motion to dismiss. If replacement counsel does file a timely notice of appearance, then replacement counsel shall have 60 days to certify he believes in good faith that he and his client will pursue the matter to trial. If replacement counsel does not so certify, defendants may file a motion to dismiss. Withdrawing counsel will ensure his client is aware of all of these procedures and requirements.

All dismissals of decertified cases (whether by motion of plaintiffs or defendants) shall be without prejudice; however, a plaintiff who re-files any decertified-and-dismissed case, regardless of the Court in which the action is re-filed, must pay to defendants all costs defendants incurred in litigating the case prior to dismissal.

- The Court set a number of additional trial dates for MDL bellwether cases, to be tried by various Judges in the Northern District of Ohio. Further, the Court identified: (1) the primary case scheduled for trial on those dates, and (2) also the backup case that will be tried on those dates if the primary case is dismissed before trial. The following chart lists all

currently-scheduled MDL bellwether trial dates.[1]

Trial Date	Primary Case	Backup Case	Trial Judge
Sept. 14, 2009	*Cooley v. Lincoln Electric Co.*, case no. 05-CV-17734		J. O'Malley
Jan. 25, 2010	*Ray v. Lincoln Electric Co.*, case no. 04-CV-18252		J. O'Malley
Mar. 15, 2010	*Arroyo v. Lincoln Electric Co.*, case no. 08-WF-17980	*Street v. Lincoln Electric Co.*, case no. 06-CV-17026	J. Zouhary
April 7, 2010	*Jerkins v. Airgas-Gulf States, Inc.*, case no. 04-CV-18810	*Hodge v. Airgas-Gulf States, Inc.*, case no. 04-CV-19007	J. O'Malley
May 3, 2010	*Kean v. Airco/BOC Group, Inc.*, case no. 06-CV-17299	*Mann v. Airco/BOC Group, Inc.*, case no. 06-CV-17288	J. Dowd
June 7, 2010	*Phillips v. Lincoln Electric Co.*, case no. 05-CV-18773	*Clinger v. Lincoln Electric Co.*, case no. 04-CV-17118	J. Nugent
July 12, 2010	*Collins v. Lincoln Electric Co.*, case no. 06-CV-17260	to be determined ("t.b.d.")	J. O'Malley
Sept., 2010 t.b.d.	*Hodge v. Airgas-Gulf States, Inc.*, case no. 04-CV-19007	t.b.d.	t.b.d.
Nov., 2010 t.b.d.	*Street v. Lincoln Electric Co.*, case no. 06-CV-17026	t.b.d.	t.b.d.
Jan. 10, 2011	*Kerecman v. Lincoln Electric Co.*, case no. 04-CV-18955	t.b.d.	J. O'Malley

[1] The cases of *Jenkins*, *Hodge*, *Kean*, and *Mann* were all filed in transferor courts other than the Northern District of Ohio. Although 28 U.S.C. §1407(a) normally calls for this MDL transferee court to remand these cases to their respective transferor courts for trial, the plaintiff in each case has waived any objection to venue not being proper in the Northern District of Ohio, and the parties have agreed to trial in this Court. *See Manual for Complex Litig. Fourth* §20.132 at 224 (2004) (noting that a plaintiff in an MDL may decide not to raise an otherwise-valid objection to venue and "consent to remain in the transferee district for trial"); *Solis v. Lincoln Elec. Co.*, 2006 WL 266530 (N.D. Ohio Feb. 1, 2006) (*Solis* docket no. 14) (discussing §1407(a), *Lexecon*, and waiver of venue).

Further, in connection with the primary and backup cases to be tried by Judges other than the undersigned, all approvals necessary pursuant to Local Rule 3.1(b)(5) have been obtained.

- On May 4, 2009, the Court designated about 1,700 cases pending in this MDL for medical records discovery. The Court directed that, following this discovery, counsel for plaintiff in each case must determine whether to: (a) certify an intent to pursue the case to trial; or, instead, (b) dismiss the case or move to withdraw. The Court further ordered counsel for plaintiffs to

> undertake efforts to: (1) determine whether there is reason to move to dismiss a case, or to withdraw representation, even before the case is put into the process for medical records discovery; and (2) determine whether it is possible to reach a certification decision before the entirety of the medical records discovery process is complete.[2]

The Court added that plaintiffs counsel might be able to "decisively rule out trial certification – or rule it in – before the medical records discovery process is complete, and possibly even before the process begins."[3]

Since that time, counsel for plaintiffs have in fact, decisively "ruled in" several of these 1,700 cases before full medical records discovery, certifying an intent to try them. Some of those "ruled in" cases have now been set for trial, as indicated in the chart above. Plaintiffs' counsel was less clear, however, regarding the extent to which they have "ruled out" trial certification of any of these 1,700 cases. Defendants objected strenuously that plaintiffs are focused too much on searching the 1,700 cases for triable lawsuits to "rule in" and not enough on winnowing non-triable lawsuits to "rule out."

The Court concludes that plaintiffs' counsel did not deviate from the Court's earlier directives, but further concludes that defendants' concerns have some validity. Accordingly,

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[2] Order at 2 (master dkt. no. 2194) (footnote omitted).

[3] *Id.* at 2 n.2.

the Court now **ORDERS** as follows. First, going forward, plaintiffs may certify an intent to try additional cases only after the medical records discovery process is complete. Plaintiffs may continue to "rule out" trial certification at any time, and should continue their efforts to identify cases that can be "ruled out" even before medical records discovery begins. Further, Plaintiffs' Lead and Liaison counsel will participate in a status conference on September 1, 2009 at 9:00 a.m., to report on the results of their efforts at "ruling out" certification of cases before medical records discovery.

- The parties and the Court discussed the case of *McCorkle v. A.O. Smith Corp.*, case no. 05-CV-18098, which is one of plaintiffs' certified cases. Plaintiffs' counsel agreed that, although they have certified the case, there is an overriding evidentiary issue that could change their view on whether the case should be tried.

  Accordingly, the Court and counsel agreed that the parties will engage in certain discovery aimed at this evidentiary issue, and the Court will hold an admissibility hearing on February 2, 2010, at the end of the *Ray* trial day. The parties will submit a proposed case management order ("CMO") for *McCorkle* that contains deadlines for any necessary fact and expert discovery, submission of expert reports, and so on, to make this critical evidentiary issue fully ripe for the hearing. The proposed CMO shall include dates for the filing of simultaneous briefs and responses, with a final briefing deadline of January 11, 2010. The parties shall inform the Court by January 11, 2010 whether, at the admissibility hearing, the parties will present testimony from any witnesses in addition to presenting oral argument. If, after the Court's evidentiary ruling, plaintiffs' counsel decides not to withdraw their

certification, the Court will set *McCorkle* as a backup case for trial in one of the empty slots on the chart shown above.

IT IS SO ORDERED.

/s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

DATED: June 11, 2009